Supreme Court, U. S.
FILED
SEP 12 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-417

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

VS.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the District of Columbia Circuit

JANICE E. KERR,
J. CALVIN SIMPSON,
RANDOLPH W. DEUTSCH,
5066 State Building,
San Francisco, California 94102,
Attorneys for Petitioners the People of the State of California and the Public Utilities Commission of the State of California.

Dated: September 12, 1978

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. Congress did not grant the Board Jurisdiction to regulate the intrastate fares of interstate carriers	10
II. The Court of Appeals has extended the authority of the *Shreveport* case beyond its applicability by failing to strictly interpret the need for a finding of unjust discrimination	13
III. The Board acted arbitrarily and against the public interest in its remedy	15
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

	Pages
Houston, East & West Texas Railway Company v. United States, 234 U.S. 342 (1914)	6, 7, 8, 10, 11, 12, 13, 14
North Carolina v. United States, 325 U.S. 507 (1945)	13, 14
People v. Western Airlines, Inc. 268 P.2d 723 (1954), *cert. den.*, sub. nom. Western Airlines, Inc. v. People of the State of California 348 U.S. 859	7, 10, 13
Railroad Commission of Wisconsin v. Chicago B & O. R.R., 257 U.S. 563 (1922)	14
Texas Aeronautics Commission v. Braniff Airways, Inc., et al., 454 S.W.2d 199 (1970), *cert. den.* 400 U.S. 943	10
Transcontinental Bus System v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. den.*, 390 U.S. 920 (1968)	11

Civil Aeronautics Board Cases

Interstate and Intrastate Fares in California and Texas Markets, CAB Decision, Order 76-7-23 (decided July 7, 1976)	1, 2, 4, 6, 15

TABLE OF CONTENTS

	Pages
Codes	
Public Utilities Code of the State of California:	
Section 461.5	9
Section 2739 et seq.	3
Constitution	
United States Constitution, Article I, Section 8, Clause 3	6
Statutes	
28 U.S.C. § 1254(1)	2
Federal Aviation Act of 1958:	
Section 101 (49 U.S.C. § 1301)	10
Section 101(10) (49 U.S.C. § 1301(10))	3
Section 101(21) (49 U.S.C. § 1301(21))	3
Section 101(22) (49 U.S.C. § 1301(22))	3
Section 101(23) (49 U.S.C. § 1301(23))	3
Section 102 (49 U.S.C. § 1302)	3
Section 404(b) (49 U.S.C. § 1374(b))	3, 4, 6, 10, 11, 15
Section 411	3
Section 1006(f), 49 U.S.C. § 1486(f)	2
Interstate Commerce Act:	
Section 1 (49 U.S.C. § 1)	12
Section 3 (49 U.S.C. § 3)	11, 12
Section 3(1) (49 U.S.C. § 3(1))	11

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No.

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California) pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 20, 1978.

OPINIONS BELOW

The judgment of the Court of Appeals is printed in Appendix A. The opinion of the Court of Appeals is not yet reported and is printed in Appendix B. The Civil Aero-

nautics Board's Opinion and Order No. 76-7-23 decided July 7, 1976 and its Order on Reconsideration, No. 76-10-138 decided October 29, 1976 in Docket 24779, *Interstate and Intrastate Fares In California and Texas Markets,* are not yet reported and are printed in Appendices C and D, respectively. The Board's Order 72-9-90, *Order of Investigation in Docket 24779,* issued September 25, 1972 is not yet reported and is printed in Appendix E. The Initial Decision of Administrative Law Judge William H. Dapper, served on April 23, 1974, is printed in Appendix F. The Board's Order No. 75-3-2 of March 3, 1975 granting discretionary review of the Initial Decision is printed in Appendix G. The Board's *Order Granting Partial Stay,* No. 77-1-137, issued January 24, 1977 and its *Order Modifying Partial Stay,* No. 77-4-22, issued April 5, 1977 are not yet reported and are printed in Appendices H and I, respectively.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 1006(f) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Sec. 1486(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has exceeded its jurisdiction by ousting state agencies from economic regulation of intrastate air travel provided by Board certificated air carriers.

2. Whether the Civil Aeronautics Board's Orders are without the requisite findings, are arbitrary and capricious, and conflict with the public interest.

[1] The Appendices cited herein are separately bound and are jointly submitted by these Petitioners and by Petitioners, the National Association of Regulatory Utility Commissioners.

STATUTORY PROVISIONS INVOLVED

Involved are Sections 101(10), 101(21), 101(22), 101(23), 102 and 404(b) of the Federal Aviation Act of 1958 as amended, 49 U.S.C. Sections 1301(10), 1301(21), 1301(22), 1301(23), 1302 and 1374(b). These provisions are set forth in Appendix J.

STATEMENT OF THE CASE

The Public Utilities Commission of the State of California is the agency in the State of California charged with the responsibility, *inter alia,* of regulating transportation by air in common carriage within the State of California. Public Utilities Code of the State of California, Section 2739, *et seq.*

On September 28, 1971, in Docket 23859, Ralph Nader and the Aviation Consumer Action Project (ACAP) filed a complaint with the Civil Aeronautics Board (Board) alleging that the differences between the interstate and intrastate fares charged by United Air Lines (United) in the Los Angeles-San Francisco market were unjustly discriminatory against interstate passengers.[2] The complaint sought both civil and criminal sanctions against United for failing to file its intrastate tariffs with the Board and for violating Sections 404(b) and 411 of the Federal Aviation Act of 1958, as amended.

The Board issued Order 72-9-90 on September 25, 1972 which dismissed the complaint and opened an investigation to determine whether the differences between intra-

[2] United also had two separate interstate fares, a jet coach and a jet commuter fare for its interstate passengers. The initial decision of the Administrative Law Judge found this practice to be unjustly discriminatory and ordered it stopped. No party complained of this ruling and hence it was not further considered by the Board. The Board was only concerned with the difference in rates between the intrastate established fares and the Board established fares.

state fares and interstate fares charged by certain federally certificated carriers between intra-California markets and between certain intra-Texas markets are unjustly discriminatory against interstate passengers or otherwise unlawful and, if so, should an order be made to correct the situation. In its Order 72-9-90 the Board stated at page 2:

> "... United is not required to file its intrastate tariffs with the Board because transportation thereunder is not 'air transportation' as defined in the Act [Federal Aviation Act of 1958 as amended]. (See Sections 403(a), 101(10) and 101(21).)"

A hearing was held before an Administrative Law Judge who issued an initial decision on April 23, 1974. The initial decision found that the differences between fares charged interstate and intrastate passengers on intrastate flights were not unjustly discriminatory as they were justified by transportation related factors. Thus the initial decision did not reach the question of whether the Board has the legal power to assert jurisdiction over the intrastate fares of interstate carriers.

In Order 75-3-2 adopted March 3, 1975, the Board granted review of the Administrative Law Judge's Initial Decision as to the issue of whether the California and Texas intrastate fares, in the markets in question, result in unjust discrimination against interstate passengers. The Board in its opinion and order 76-7-23[3] concluded, however, that unjust discrimination within the meaning of subsection 404(b) of the Federal Aviation Act of 1958, as amended, (49 U.S.C. Sec. 1374(b)) was established as between "knowledgeable" and "unknowledgeable" interstate stopover passengers.[4] It was

[3] See CAB Order 76-7-23, issued July 7, 1976, mimeo at pages 4-7. (Appendix C pages 23-28.)

[4] Interstate stopover passengers are defined by the Board as those passengers making brief stops at one or more points en route on an interstate flight, such as a passenger traveling from Seattle, Washington to Los Angeles, California, who might wish to spend a period in San Francisco before continuing to his destination. While the so-called "stopover" passenger is the interstate traveler who is the cornerstone of the Board's orders, it is questionable that this person is in interstate travel at all once he has broken his interstate flight. California has taken the position, and continues to take the position, that the traveler is an intrastate passenger for the intrastate segment of his trip.

reasoned that the so-called knowledgeable interstate stopover traveler would take advantage of the lower intrastate fare over intrastate segments of his interstate trip while the unknowledgeable stopover interstate traveler would simply purchase one through ticket at the interstate rate for his journey.

The remedy established by the Board to eliminate the discrimination found to exist between the knowledgeable and unknowledgeable interstate stopover passengers was to order federally certificated carriers to establish the same fares for passengers moving in either intrastate or interstate transportation between the same points in the same class of service. Thus the carriers were ordered to supersede their intrastate tariffs with tariffs in accordance with Board Order 74-12-109 in *The Domestic Passenger Fare Investigation* (Docket 21866, *et al.*). The order provided, however, that such fares may be lowered to the extent necessary to meet the competition from intrastate carriers.

The Board concluded that by ordering federally certificated carriers to charge only interstate fares to all passengers whether they are interstate or intrastate passengers is no assertion of its authority under the Federal Aviation Act to control the intrastate rates of federally certificated carriers or intrastate carriers as such. It was merely eliminating unjust discrimination between various interstate passengers.

Petitions for reconsideration were filed, including a joint petition by the National Association of Regulatory Utility Commissioners (NARUC) and California.

On October 29, 1976, in Order 76-10-138, the Board denied the petitions for reconsideration.[5]

California, NARUC and the Texas Aeronautics Commission filed petitions for review with the United States Court of Appeals for the District of Columbia Circuit in Dockets Nos. 76-2117, 76-2123 and 76-2155 respectively.

The Court of Appeals, by opinion issued June 20, 1978 upheld the orders of the Board under review. The Court of Appeals, taking a broader view of the case than the Board stated that its review concerned the authority granted the Board by statute and delegated to it by the Congress under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution. The Court of Appeals, in a cursory statement, found that the Board had sufficient evidence to conclude that there was unjust discrimination. The Court of Appeals then found that the Board had authority to eliminate this unjust discrimination by preempting the intrastate fares in issue, the Board's authority being grounded in the Federal Aviation Act, Section 404(b) (49 U.S.C., Sec. 1374(b)) with reliance on the Supreme Court's decision in *Houston, East & West Texas Railway Company v. United States*, 234 U.S. 342 (1914) (Shreveport Case.). The Court of Appeals found that the Federal Aviation Act was modeled after the Interstate Commerce Act and therefore the *Shreveport* doctrine gave the Board authority to preempt an intrastate rate structure when unjust discrimination against the interstate passenger is found. The Court of Appeals further found that the remedy mandated by the Board, the elimination of the lower intrastate rates, was not arbitrary.

[5] On December 30, 1976, California petitioned the Board to stay Order 76-7-23 and Order 76-10-138 pending judicial review of those orders. By Order 77-1-137, adopted on January 24, 1977, the Board granted partial stay of Order 76-7-23 and modified the stay by Order 77-4-22.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals erroneously allows to stand Board orders that represent an extension of its economic regulatory jurisdiction far beyond the boundaries prescribed in the Federal Aviation Act of 1958. In effect, the Board has illegally assumed continuing jurisdiction over the intrastate rates of federally-certificated carriers in California as well as Texas intrastate markets.[6] Although the Board disclaimed any authority over intrastate fares, the orders in question will accomplish the result of having federally certificated carriers file their intrastate tariffs with the Board for approval.

The decision of the court below is based on an incorrect application and extension of the Federal Aviation Act of 1958 as well as an erroneous interpretation of the Congressional intent in passing that Act. The Court of Appeals also incorrectly applied the Supreme Court's decision in the *Shreveport* case and ignored other major decisions which have limited the Board's jurisdiction including *People v. Western Airlines, Inc.* 268 P.2d 723, (1954) *cert. den.*, sub. nom. *Western Airlines, Inc. v. People of the State of California* 348 U.S. 859. The jurisdiction and power of the Board can be no greater than that which Congress has conferred upon it. Congress explicitly limited the Board to the regulation of interstate, overseas, or foreign air transportation and in fact has consistently rejected extension of Board economic regulation of intrastate travel.

[6] Other states such as Florida, Pennsylvania and Nevada have varying degrees of intrastate air transportation regulation that appear to be affected by this new Board policy.

The Court of Appeals additionally based its decision on the erroneous assumption that the Board had found a "Shreveport-type" unjust discrimination in this case. It clearly had not. The *Shreveport* case involved an unlawful burden on interstate commerce because a preference was given to intrastate commerce against interstate commerce. In the instant case the California intrastate air fares are lawful and part of the comprehensive scheme of economic regulation of intrastate air transportation. The Federal Aviation Act of 1958 allows for such a dual fare structure and this was explicitly recognized by the Board in its orders. The Board did not make the prerequisite and critical finding of unjust discrimination between intrastate and interstate passengers. What the Board did conclude is that there is unjust discrimination only between "knowledgeable" and "unknowledgeable" interstate stopover travelers. This arises when certain interstate passengers make improper use of intrastate fares; clearly a matter of enforcement of interstate rate tariffs.

In order to correct this dubious discrimination problem, the Board has chosen a course of action that creates unnecessary conflict with air transportation regulation in California that has been in effect for over 25 years and causes grave economic consequences to the California air traveler. The immediate effect of the Board's orders will be a substantial increase in intrastate fares on intra-California monopoly routes served exclusively by federally certificated carriers. This is estimated to cost California air travelers approximately $3 million per year in added air fares.[7] In some instances these orders create prohibitive fare increases for intra-California travelers. The orders in issue have numerous long

[7] This figure results from applications filed by interstate carriers with California to increase intrastate fares in compliance with the Board's orders.

range consequences, moreover, which the Board failed to consider. The Board failed to examine the economic impact on rural California communities served by Board certified monopoly carriers. The subject orders also create conflict with California statutes. For example, California Public Utilities Code Section 461.5 prohibits carriers from charging more for a shorthaul than a longhaul over the same route in the same direction. In many instances where a federally certificated carrier competes with an intrastate carrier over an entire route but is a monopoly carrier over only a part of the route in California it is caught between the conflicting State and Board regulations. Most importantly, the Board's orders unnecessarily upset a long-standing competitive check and balance between the intrastate and federally certificated carriers. Currently, the federally certificated carriers have intrastate fares between 42 California city pairs that are lower than the fares of the California certified carriers operating between the same city pairs. Both categories of carriers have historically taken the initiative to lower fares to be competitive. Under the Board's orders, the federally certificated carriers must increase their intrastate fares and can only lower them to *meet* fares as established by intrastate carriers.[8] All competitive incentive, therefore, has been destroyed in this one set of orders.

In the usual course of events, a decision eliminating alleged unjust discrimination is hailed as a consumer-oriented victory. However, in the present case, such an outcome will not occur. What will ultimately occur is that all passengers, on federally certificated carriers, intrastate and interstate, will pay a higher fare for the same service they are now receiving.

[8] The effect of the raising of the fares on these routes by interstate carriers to meet intrastate carrier fares is estimated as an additional $9 million per year for California air travelers.

I. Congress did not grant the Board Jurisdiction to regulate the intrastate fares of interstate carriers.

The Court of Appeals erred in finding that Congress, in passing the Federal Aviation Act of 1958, gave the Board the same authority as is found in the Interstate Commerce Act to regulate intrastate rates and hence the Court of Appeals erred in finding that the *Shreveport* case is applicable to the Federal Aviation Act of 1958.

There is no question that Congress has the authority to preempt intrastate regulation. However, when a comparison is made of the Federal Aviation Act of 1958 and the Interstate Commerce Act it becomes clear that Congress did not grant the same broad authority in both acts. The lengthy definitions in Section 101 of the Federal Aviation Act (49 U.S.C. Sec. 1301) clearly limits the Board to the regulation of interstate air transportation. (See Appendix J.) It can hardly be argued that the Congress, after going to such lengths to define the parameters of the Board's jurisdiction in terms of carriage by aircraft across state lines, did not intend by such definitions to exclude Board jurisdiction over intrastate air transportation. The section of the Act in issue in this case, Section 404(b) (49 U.S.C. 1374(b)), is totally confined to the regulation of rates for interstate, overseas, foreign or mail transportation. (See Appendix J.) There is no indication that Board jurisdiction would lie in regard to intrastate rates even as those rates might relate to interstate rates. These statutory limitations placed on Federal authority to regulate intrastate airline concerns have been long recognized by the courts. In *Texas Aeronautics Commission v. Braniff Airways, Inc., et al,* 454 S.W.2d 199 (1970), *cert. den.* 400 U.S. 943 and *People v. Western Airlines, Inc.,* 268 P.2d 723 (1954) *cert. den.* 348 U.S. 859, the Texas and California Supreme Courts found that Congress has not sought to extend the economic regulation of the Board to intrastate air transportation.

The Court of Appeals, in analyzing *Shreveport,* reasoned that the Interstate Commerce Act did not extend regulation to intrastate commerce. However, the Supreme Court found that when unjust discrimination arises from the relation of intrastate to interstate rates, Congress is competent to deal with it. The Court of Appeals went on to state that the Federal Aviation Act of 1958 was modeled after the Interstate Commerce Act citing *Transcontinental Bus System v. CAB,* 383 F.2d 466 (5th Cir. 1967), *cert. den.,* 390 U.S. 920 (1968). However, this case as well as other cited cases on this subject do not deal at all with the exercise of *Shreveport*-type authority over intrastate rates. They are strictly interstate rate cases. In fact, the language of the Federal Aviation Act of 1958 is much more restrictive than the Interstate Commerce Act. Further, the Court in *Shreveport* gave much more weight to the actual wording of the Interstate Commerce Act as the basis for sustaining preemption authority than the Court of Appeals below recognized.

In *Shreveport,* the Supreme Court said that the grant of authority given by Congress to the Interstate Commerce Commission was evidenced by Section 3(1) of the Interstate Commerce Act (49 U.S.C. Sec. 3(1)). Section 3 of the Interstate Commerce Act pertains to "any common carrier subject to the provisions of this chapter". (See Appendix K.) However, Section 404(b) of the Federal Aviation Act of 1958, pertaining to rate discrimination, refers only to "air transportation". This, as stated previously, is defined as interstate, overseas, or foreign air transportation or the transportation of mail by aircraft. No such limitation to "interstate, overseas or foreign transportation is found in the wording of Section 3(1) of the Interstate Commerce Act. The Board, as opposed to the Interstate Commerce Commission, has not been given authority to be the arbiter over the relationships between interstate and intrastate fares. In the *Shreveport* case, the Supreme Court was care-

ful to indicate the scope of the jurisdiction given the Interstate Commerce Commission by the Congress.

> "This language [Section 3 of the Interstate Commerce Act] is certainly sweeping enough to embrace all of the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier."[9]

In the authority granted to the Board to remove unjust discrimination in fare structures there is a "qualification" which limits the Board's authority to that of regulating the relations between differing fares in interstate transportation only. Further, Section 1 of the Interstate Commerce Act, cited by the Court of Appeals below, specifically confers jurisdiction over the carrier itself. Additionally, as referenced above, the authority of the Interstate Commerce Commission to affect intrastate rates in *Shreveport* derives from Section 3 of the Interstate Commerce Act which applies to all common carriers with no restriction on the type of transportation involved (interstate or intrastate). In the Federal Aviation Act, however, Congress specifically limited the Board to regulation of interstate air transportation. There is no provision conferring general jurisdiction over air carriers similar to Sections 1 and 3 of the Interstate Commerce Act. The Federal Aviation Act is clearly meant to be less far-reaching.

The Court of Appeals additionally erred in its interpretation of the Congressional history of the Federal Aviation Act. The Court stated:

> "In addition, the legislative history of the Civil Aeronautics Act of 1938 indicate that Congress, although

[9] *Houston, East & West Texas Railway Company v. United States, supra,* 234 U.S. at 356.

> asked to do so, decided not to limit the application of the Shreveport doctrine in air transportation as it had done in highway transportation."

Just the opposite is true. The *Shreveport* case was decided in 1914. If Congress had intended to give the Board *Shreveport*-type authority to prescribe intrastate rates after a finding that existing intrastate rates unjustly discriminate against, or are an undue burden upon, interstate commerce it would have included in the Civil Aeronautics Act of 1938 or the Federal Aviation Act of 1958 some explicit provision to that effect. Congress has confirmed, at least several times, its original decision to divide the economic regulatory responsibilities over air transportation between state and federal authorities by refusing to amend the Acts to place all such responsibility in a federal body. (See *People v. Western Air Lines, Inc., supra,* fn. 4 at 737 which lists six separate congressional history references on this matter.)

II. The Court of Appeals has extended the authority of the Shreveport case beyond its applicability by failing to strictly interpret the need for a finding of unjust discrimination.

Assuming arguendo that the Board has *Shreveport* type authority, the Board in this case has not complied with the indispensable prerequisites to the exercise of such power. Intrastate transportation and rate setting are primarily the concern of the state. The power of the Interstate Commerce Commission as noted in the *Shreveport* case and those cases relying on the *Shreveport* case with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. A high standard of certainty must be met before the intrastate rates can be preempted by the interstate rates. *North Carolina v. United States,* 325 U.S. 507 (1945). As noted above in

this Petition, the Federal Aviation Act recognizes a dual air fare structure as does the Board. The Court of Appeals failed to recognize that the instant case does not involve a question of intrastate fares favoring intrastate persons or localities as was the issue in *Shreveport.* Nor does the case at issue involve any question of a non-compensatory intrastate fare as was the issue in the *Wisconsin Passenger Fare* case, also relied on by the Board.[10]

The Court of Appeals noted that there is a disparity between intrastate rates and interstate rates and further noted that the Board found an unjust discrimination between knowledgeable and unknowledgeable interstate stopover passengers. The Court of Appeals then made a critical error, however, by failing to distinguish between the two Board findings. (See page 8 of its mimeo decision Appendix B, page .....) The Board did not find that the intrastate rates were unjustly discriminatory. Thus the Court of Appeals has extended the *Shreveport* case to the point where any alleged problem in the interstate air transportation rate structure will justify the preemption of intrastate rates if there is a disparity between interstate and intrastate fares.

This interpretation is in error. Merely showing that the two rates are in disparity does not constitute unjust discrimination. *North Carolina v. United States, supra,* at 512, 514. The Board here has not shown nor even alleged that the rate differentials involved here cause an undue or unjust burden on interstate commerce. This must be shown under *Shreveport.* Here the Board created the victim of the alleged discrimination. The Board found unjust discrimination among various interstate passengers. The Orders in question are not based

[10] *Railroad Commission of Wisconsin v. Chicago B & O. R.R.*, 257 U.S. 563 (1922).

on the fact that intrastate passengers as a group unjustly pay a lower fare as compared with the higher fare paid by all interstate passengers. What the Board did was to arbitrarily preempt intrastate rate jurisdiction to resolve a relatively minor interstate rate tariff problem. This action was erroneously sanctioned by the Court of Appeals.

III. The Board acted arbitrarily and against the public interest in its remedy.

The Board's *Order of Investigation* raised the primary issue of whether the differences between the fares charged to intrastate passengers and the fares charged to interstate stopover passengers were unjustly discriminatory. The decision of the Administrative Law Judge in this case analyzed at great length the difference and concluded that the difference is not unjustly discriminatory pursuant to Section 404(b) of the Federal Aviation Act of 1958. Yet without prior notice to the parties the Board in its Order 76-7-23 did not focus its review on this issue at all, but rather raised the issue of discrimination existing between knowledgeable and unknowledgeable *interstate* stopover passengers. This theory was not tested at the evidentiary hearing and no input was received on how to deal with this alleged discrimination. Yet the Board arbitrarily and without consideration for the public interest took the extreme measure of preempting intrastate rate regulation with the inherent conflicts caused thereby. The harm done to the traveling public in California and California intrastate air transportation regulation including higher fares, discrimination against rural monopoly markets, conflict with intrastate regulation and disruption of competition have been previously addressed.

If discrimination between knowledgeable interstate passengers who buy two separate tickets for their journey and

unknowledgeable interstate passengers who purchase one through ticket actually exists there are many ways to remedy the problem short of preemption. The Board considered none of these, choosing instead to summarily dismiss consideration of other approaches as too difficult to enforce. The basis for this view cannot be understood as it was never tested in the case.

The Board could easily resolve this situation by requiring the airlines to make all passengers "knowledgeable" by informing them of their option to purchase a separate intrastate ticket and also informing them of the inconveniences involved such as the lack of through handling of baggage. The Board could also refuse to allow airlines to "double ticket" passengers. That is the practice of issuing a passenger an intrastate and interstate ticket at the same time for a through flight. The Board could further order interstate airlines to adopt state determined rates for all intrastate segments of air flights. In fact, the Board authorized this result in the orders in question, when competition exists with intrastate carriers. In short, numerous other solutions exist other than the total disruption of intrastate air transportation regulation through preemption.

CONCLUSION

It is respectfully submitted that by ousting California from economic regulation of intra-California air transportation on federally certificated carriers the Board has adversely affected intra-California air travelers in a way which Congress clearly did not authorize.

Because of the very important federal-state jurisdictional questions presented and the effects on California intrastate air transportation of the Board's orders, California respectfully submits that this petition for a writ

of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Dated: September 8, 1978.

Respectfully submitted,

JANICE E. KERR,
J. CALVIN SIMPSON,
RANDOLPH W. DEUTSCH,

Attorneys for Petitioners the People of the State of California and the Public Utilities Commission of the State of California.